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Supreme Court, U.S.
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No. 92-895

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DAVID J. ROUCH,

Petitioner,

v.

ENQUIRER AND NEWS
OF BATTLE CREEK, MICHIGAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

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34 pp

QUESTIONS PRESENTED

1. Whether petitioner, who urged the Michigan Supreme Court to undertake an independent appellate review in this case, may now properly challenge that Court for having done so.

2. Whether publication of a substantially fair and accurate newspaper report of a libel plaintiff's arrest is protected by the First and Fourteenth Amendments.

LIST OF PARTIES AND STATEMENT PURSUANT TO RULE 29.1

The list of parties contained in the Petition for Writ of Certiorari is correct. Respondent Enquirer & News of Battle Creek is a newspaper published by a wholly-owned subsidiary of Gannett Co., Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

CITATION OF OPINIONS BELOW

The decision which Petitioner asks this Court to review is reported at 440 Mich. 238, 487 N.W.2d 205 (1992) and is reprinted in Petitioner's Appendix ("Pet. App.") at 1. That decision reversed the Michigan Court of Appeals holding reported at 184 Mich. App. 19, 457 N.W.2d 74 (1990) and reprinted at Pet. App. 165. The decision of the Trial Court denying Respondent's motion for judgment notwithstanding the verdict is not officially reported; portions are reprinted at Pet. App. 151.

Before trial, the Michigan Circuit Court granted summary judgment dismissing the action; its unreported order and decision appear at Pet. App. 57. The pre-trial decision of the Michigan Court of Appeals, reversing the grant of summary judgment, is reported at 137 Mich. App. 39, 357 N.W.2d 794 (1984) and is reprinted at Pet. App. 63. The pre-trial decision of the Michigan Supreme Court which remanded the case for trial is reported at 427 Mich. 157, 398 N.W.2d 245 (1986) and is reprinted at Pet. App. 83.

STATEMENT OF THE CASE

This private figure libel action is based upon a "police blotter" newspaper article which reported the petitioner's arrest for committing a violent crime.

1. Petitioner's Arrest

Early in the morning of Friday, December 21, 1979, a 17-year-old babysitter was brutally raped at knifepoint in Battle Creek, Michigan.

Following the rape the police were called. They interviewed the victim and two witnesses (R.504a-06a, 508a).[1] All three independently identified petitioner David Rouch as the assailant (R.145a, 176a, 420-21a, 504a, 506a, 508a).

Within two hours of the attack, at 5:25 a.m., the police arrived at petitioner's house, summoned him outside (R.509a), told him they were "charging" him with the rape, and arrested him (R.144-45a). Petitioner was handcuffed, interrogated, and fingerprinted (R.54-57a, 144-46a, 169a, 508-09a). Briefed by police as to the

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[1] Page references to the appendices filed in the Michigan Supreme Court are designated "R.____."

crime and the circumstances surrounding petitioner's arrest, the local prosecutor authorized petitioner's booking in the local jail on a charge of Criminal Sexual Conduct in the First Degree (Pet. App. 192-93; R.417a, 507a).

Within a few hours, a Magistrate released petitioner on bond (R.510a), on condition that he appear for his arraignment on December 28, 1979 (R.147a).

2. **Preparation of the News Article**

The article at issue in this case was written by Stan Kaufman, a reporter for more than 25 years (R.289a). On the day in question Kaufman, who had won a number of journalism awards (R.290a, 379-80a), followed his normal routine and made the "rounds" of local police departments (R.289-93a, 403-04a).

Kaufman received all the information contained in the news article during telephone conversations with the police (R.269a, 292-93a, 593-94a.)[2] He typed the article,

---

[2]Eight years later at the trial, the reporter was uncertain as to the identity of the police officers with whom he had spoken (R.292-93a, 296-97a). The reporter thought he had talked with either the Chief of Police or a Sergeant (R.296-97a), but both officers denied talking to the reporter (R.193a, 401a). Other police officers participated in petitioner's arrest (R.212a, 400a, 418a), however, and the police witnesses did not know whether one of those other officers had spoken with the reporter (R.194-95a, 418a). The reporter obviously discussed the arrest with the police, since the news article accurately recounts precise details of the arrest (R.362-63a, 430a). Petitioner agrees that the police identified him to the newspaper (R.60-61a).

Nevertheless, the precise identity of the police officers to whom the reporter spoke is irrelevant to the falsity of the article, and the Court below did not consider the issue. (Pet. App. 9-10 and n. 14).

and submitted it for publication (R.296-97a). The article (Pet. App. 198) states:

> POLICE ARREST SUSPECT IN
> BABY-SITTER ASSAULT
>
> A 43-year-old man has been arrested and charged with the sexual assault of a 17-year-old woman who was baby-sitting with his children at his ex-wife's house on North Finlay Avenue in Bedford Township.
>
> The suspect has been identified by Bedford Township police as David J. Rouch of 631 Golden Ave. He is free on a $10,000 personal recognizance interim bond pending his arraignment in District 10 Court next week. Rouch is charged with first-degree criminal sexual conduct.
>
> Police said Rouch allegedly entered the house about 4 a.m. Friday and attacked the young woman. He is said to have used a knife to cut the victim's clothes off, police said.
>
> The victim later called a relative, who took her to Community Hospital and then called police. The suspect was identified by his children, according to police.
>
> Rouch was arrested at his home by Emmett Township police, who were informed where he lived by Bedford Township investigators.
>
> The charge against Rouch was authorized Friday by the Calhoun County Prosecutor's Office.

The article accurately reports the arrest. It does not, as petitioner contends, accuse petitioner of committing the rape, but instead specifically notes in its headline and throughout its text that petitioner was arrested as a "suspect." It dispassionately reflects the details—such as

ages, addresses, times and locations—contained in the relevant police reports (R.407-23a, 503-09a).

Six days after the news article was published, petitioner was told his scheduled arraignment would not take place (R.62a). The next month, the prosecutor decided to drop the charges against petitioner (R.141a).

Although the newspaper continued regularly to contact the police, the prosecutor, and the courts for news about the criminal process, no one ever told its reporters that the charges were dropped. Had anyone done so, the newspaper would have published a timely follow-up article (R.384-85a, 388-90a).

Petitioner instead filed his complaint almost a year later, on December 5, 1980. The case was tried in February 1988, and the jury returned a $1,000,000 verdict against the newspaper. With interest, the judgment in the case approximated $4,000,000 when the Michigan Supreme Court dismissed it in the decision now challenged.

3. **The Article Was Accurate in All Material Respects**

According to petitioner, the principal falsehood in the article was its statement that he was "charged." Petitioner also alleges that the article inaccurately recounted that the prosecutor authorized the charge against him, and erroneously stated that he was identified to the police by his children (Pet. App. 9). Petitioner's claims, however, ignore the uncontradicted trial evidence.

First, the undisputed evidence demonstrated that petitioner had been "charged" with a crime. As the Court below recognized (Pet. App. 27, n. 30), petitioner (R.52a-55a, 145a), his son (R.169-70a, 173-74a), his expert witness (R.141a), a police sergeant (R.197-98a, 211a) and

a police chief (R.410a) all testified at trial that he was "charged," and official police and court records confirmed it (Pet. App. 27, n. 32; R.503a, 509-10a). The evidence on this point was so unequivocal and compelling that petitioner and his attorney formally "concede[d] that the [newspaper] article in question and its reference to the [petitioner] being arrested *and being charged . . . were true*" (Pet. App. 27; Respondent's Appendix ["Resp. App."] 1a-2a) (emphasis added).

Indeed, petitioner's claim that he was not "charged" is not based on any trial evidence, but is instead premised upon petitioner's flawed interpretation of Michigan law. Notwithstanding petitioner's legal theory that he could not have been "charged" prior to his formal arraignment, it is quite clear under Michigan law that "once the police act on an accusation," as they did in this case, an arrestee is "charged" (Pet. App. 26). Petitioner's thesis to the contrary should be disregarded by this Court.

Second, as the Michigan Supreme Court observed, the evidence indisputably showed that the local prosecutor did authorize petitioner's booking on a charge of Criminal Sexual Conduct in the First Degree (Pet. App. 4, n. 5, 7-9, 28, 192-93; R.417a, 507a). The article was thus true in this respect as well. Contrary to the claim in the Petition for Certiorari, Respondent has never conceded the falsity of that portion of the newspaper article (*Compare*, Petition for Certiorari p. 22 *with* Resp. App. 5a.)

Finally, petitioner is technically correct when he states that he was not identified as the rapist by his "children," as stated in the newspaper article. Petitioner *was*, however, identified independently by multiple eyewitnesses, including his two *stepchildren*, with whom petitioner had lived when he was married to their mother (R.162a). The

rape victim also identified petitioner to the police, and she too had a pre-existing relationship with him, enhancing her ability to recognize him (R.162a, 504-08a): earlier in the evening, petitioner had driven her to the scene of the assault (R.48-49a, 161a, 506a). Prior acquaintance, of course, is the most powerful indicator of a valid criminal identification. As the Michigan Supreme Court held, this minor inaccuracy in the newspaper article is not actionable under Michigan common law since the "gist" or "sting" of the news report was that petitioner "was arrested on the basis of the identification of persons who knew him." (Pet. App. 30-31).

REASONS WHY THE PETITION SHOULD BE DENIED

POINT ONE
PETITIONER WAIVED THE CONSTITUTIONAL ISSUE HE NOW ASSERTS

Contrary to the specific requirements of Rule 14.1(h), the Petition for Certiorari fails to specify the stage in the proceedings at which petitioner raised the issues of which he now seeks review. It also fails to describe the manner in which petitioner purportedly raised those issues (Petition for Certiorari p. 7-8).

In fact, petitioner did not challenge the propriety of independent appellate review by the Michigan Supreme Court, and this Court should not, therefore, grant certiorari.

In its appeal to the Michigan Supreme Court, Respondent newspaper argued that the Court was obligated to review the issue of falsity de novo. Respondent relied both upon this Court's decision in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, *reh. den.*,

467 U.S. 1267 (1984), and the Michigan Supreme Court's 1991 decision in *Locricchio v. Evening News Assn.*, 438 Mich. 84, 476 N.W.2d 112 (1991), *cert. denied*, ___ U.S. ___, 117 L.Ed.2d 495 (1992).

In *Locricchio*, the Michigan Supreme Court held that an appellate court must "independently review the record with regard to falsity" in a private figure libel case involving a matter of public interest (Pet. App. 14):

> [I]n *Philadelphia Newspapers v. Hepps* . . . the Supreme Court . . . created an issue of constitutional fact regarding whether a plaintiff carries the burden of proving falsity.
>
> We therefore conclude that an independent appellate review of the burden of proof with regard to falsity in private-figure, public interest cases deters "forbidden intrusion on the field of free expression" as a logical corollary to independent review of actual malice.

Locricchio v. Evening News Assn., supra, 438 Mich. at 113, 476 N.W.2d at 124-25.

In his brief to the Michigan Supreme Court, petitioner did not question or object to independent appellate review of falsity in this libel case. To the contrary, petitioner affirmatively insisted that independent appellate review of falsity was constitutionally required.

Petitioner thus argued to the Michigan Supreme Court the direct antithesis of the position he now asserts to this Court. Petitioner's brief to the Michigan Supreme Court declared:

> *Standard of Review.*
>
> In reviewing the findings of falsity and negligence necessary to overcome the First Amendment protection accorded reports of matters of public interest,

> this Court has recently held that appellate courts must conduct an independent review of the evidence related to issues of "constitutional fact" to ensure that the plaintiff has met his constitutionally mandated burden of proof. . . . The purpose of independent review is not to usurp the proper function of the jury but to ensure that the plaintiff has presented evidence sufficient to meet his constitutionally mandated burden of proof.

(Resp. App. 7a).

Indeed, petitioner not only endorsed the concept of independent appellate review, but insisted also that it be very broad in scope. He urged that it not be limited to discrete constitutional issues, and argued that the independent appellate review instead expand to encompass review of the entire judgment: "this [Michigan Supreme] Court will rule on the *judgment* of that [Michigan] Court [of Appeals] rather than its reasoning and must do so after its own independent review of the evidence presented at trial" (Resp. App. 8a, n.5).

Only after he lost the decision below did petitioner haltingly indicate any uncertainty as to the doctrine of independent appellate review. However, even after the Michigan Supreme Court's decision, and although he challenged the result of the Michigan Supreme Court's analysis in a motion for rehearing, petitioner steadfastly reiterated that independent appellate review was proper. Petitioner did "not allege that it was erroneous for [the Michigan Supreme] Court to independently review the record in the present case . . ." (Resp. App. 9a).

Under Michigan law, a legal argument cannot properly be made for the first time in a motion for rehearing before the Michigan Supreme Court. Such untimely claims

are waived. *Poston v. Ebert*, 221 Mich. 369, 193 N.W. 201 (1923), *rev'd on other grounds*, 266 U.S. 548 (1925); *Lagden v. Concordia Mut. Fire Ins. Co.*, 188 Mich. 689, 158 N.W. 848 (1916). Thus, even had petitioner raised his current argument in his motion for rehearing to the Michigan Supreme Court, it would not be properly raised here. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945).

Petitioner, however, goes much farther than that. He presents to this Court a legal claim *precisely to the contrary* of the claim he made to the Michigan Supreme Court. He now challenges the propriety of independent appellate review of falsity in private figure libel cases, notwithstanding his endorsement of exactly that standard of review in the Michigan courts. Most assuredly, his newly found position is not one upon which certiorari may properly be granted.

POINT TWO

THERE IS AN ADEQUATE AND INDEPENDENT STATE GROUND FOR THE DECISION BELOW

Under Michigan common law, assertedly libelous statements are not actionable unless they are false in a material respect, i.e., their "gist" or "sting" must be false (Pet. App. 18 and n. 23). Time and time again the Michigan Courts have so held. *McAllister v. Detroit Free Press*, 85 Mich. 453, 461, 48 N.W. 612 (1891); *Kovacs v. Mayoras*, 175 Mich. 582, 593, 141 N.W. 662 (1913); *McGuire v. Vaughn*, 106 Mich. 280, 286-287, 64 N.W. 44 (1895); *Fisher v. Detroit Free Press Co.*, 158 Mich. App. 409, 414, 404 N.W.2d 765 (1987). Under the common law of Michigan, the so-called "substantial truth" (or "gist or sting") test presents a question of law, and as such has routinely compelled dismissal without trial of Michigan

libel suits premised upon technically inaccurate use of legal terminology (Pet. App. 192). *Morganroth v. Whitall*, 161 Mich. App. 785, 790, 411 N.W.2d 859 (1987); *Fisher v. Detroit Free Press, supra*, 158 Mich. App. at 414. Newspapers may use "ordinary conversation" to describe legal events. *Bailey v. Kalamazoo Publishing Co.*, 40 Mich. 251, 255-256 (1879).

In Part IV of its opinion (Pet. App. 18-31), the Michigan Supreme Court discussed these common law principles and applied them to the newspaper article at issue in this case. In its discussion, the Court concluded that Michigan common law required dismissal of petitioner's libel action. Because there is an independent and adequate State law basis for the opinion below, certiorari should not be granted.

Noting the constitutionalization of libel law, the Court nevertheless emphasized that the "definition of falsity remains based on the common-law doctrine" (Pet. App. 19) and observed that under Michigan law, constitutional considerations regarding the issue of falsity are effectively redundant: "the constitutional requirement for testing falsity mirrors Michigan's common law test" (Pet. App. 19). Thereafter, the Michigan Supreme Court's discussion emphasized the common law "substantial truth doctrine" (Pet. App. 19, 30) and the "gist or sting" test (Pet. App. 22-23, 30).

The dismissal of this case was based squarely upon settled common law principles. The Michigan Supreme Court criticized the Court of Appeals for failing properly to "ascertain the 'gist' or 'sting' of the article" (Pet. App. 23); "conclude[d] that use of 'charge' . . . cannot be deemed materially false" (Pet. App. 26); and held that petitioner's "additional complaint [of falsity] falls within

the . . . category of cases arising under the substantial truth doctrine" (Pet. App. 29).

The heart of the Michigan Supreme Court's decision lies in its straightforward juxtaposition of the published news article with a version of that article revised by the Court, in which the Court "substitute[d] language that the plaintiff asserts should have been used" (Pet. App. 21). Thus fully accepting petitioner's version of the underlying historical facts, the Michigan Supreme Court concluded that those facts did not establish material falsity as a matter of Michigan law. The Court's conclusion that the "gist or sting of the article is [not] changed by these minor differences" is a simple application of common law principles (Pet. App. 20-22). In applying that settled common law doctrine, the Michigan Court merely engaged in the same common law analysis as that recently used by this Court to dismiss a portion of another libel claim, again as a matter of law and without the need for a trial. *Masson v. New Yorker Magazine, Inc.*, ___ U.S. ___, 115 L.Ed.2d 447, 477 (1991).

The decision below analyzed common law and constitutional maxims. The dismissal of this action, however, was based on a long-settled Michigan common law principle as well as on the First Amendment: "after painstaking review of the whole record *in light of Michigan libel law and* the latest constitutional pronouncements . . . we conclude that the evidence was not sufficient to establish material falsity (emphasis added)" (Pet. App. 31).

Indeed, no matter what the standard of review or substantive law applied, the factual error in the newspaper article at issue in this case is so trivial as to warrant dismissal of petitioner's libel claim, as a matter of law. Because the decision below is independently based upon common law, certiorari should be denied.

POINT THREE

THE PETITION DOES NOT DEMONSTRATE A SUBSTANTIAL CONFLICT

Petitioner suggests that the Michigan Supreme Court's endorsement of independent appellate review of falsity in private-figure libel cases conflicts with a series of earlier decisions (Petition p. 17-18). None of the cases cited, however, warrants review of this case.

Thus in *Newton v. National Broadcasting Co., Inc.*, 930 F.2d 662 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 192 (1991), a public figure libel case, the Court held that the plaintiff had failed to prove actual malice. That holding was dispositive; falsity was assumed. *Id.* at 668-69. The Court did not rule on the standard of appellate review of falsity in private figure libel cases, and the decision does not conflict with the decision at bar.

Similarly, both *Bartimo v. Horsemen's Benev. and Protective Ass'n.*, 771 F.2d 894 (5th Cir. 1985), *cert. denied*, 475 U.S. 1119 (1986) and *Tavoloureas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987) (*en banc*), *cert. denied*, 484 U.S. 870 (1988) are public figure libel cases in which the courts independently reviewed the issue of actual malice, but rendered no decision concerning the issue posited by petitioner. In *Nor-west Cable Communications v. City of St. Paul*, 924 F.2d 741, 746-47 (8th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2853 (1991), the Court held merely that the First Amendment does not require independent appellate review of the issue of standing. Both *Starkins v. Bateman*, 150 Ariz. 537, 724 P.2d 1206 (Ct. App. 1986) and *Brown v. K.N.D. Corporation*, 205 Conn. 8, 529 A.2d 1292 (1987) are public official cases which generally discuss appellate review of actual malice determinations; neither decision conflicts with the decision below.

Finally, in *Levine v. CMP Publications, Inc.*, 738 F.2d 660, 672, n. 19 (5th Cir. 1984), the Court rejected independent appellate review of the falsity issue if it would require an appellate court to disregard a jury's "credibility choices based on the demeanor of witnesses." That proposition is entirely consistent with the Michigan law applied in this case, which holds that "an appellate court does not and should not exercise review of credibility determinations." *Locricchio v. Evening News Assn.*, *supra*, 438 Mich. at 112, n. 17, 476 N.W.2d at 124, n. 17.

Because petitioner has therefore utterly failed to demonstrate any real or substantial conflict, certiorari should be denied.

POINT FOUR

THE MICHIGAN SUPREME COURT APPLIED THE PROPER STANDARD OF REVIEW

The First Amendment requires private figure libel plaintiffs such as petitioner to prove falsity before they may recover a judgment based on publication of matters of public interest. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

Most assuredly, the article reporting petitioner's arrest was in the public interest. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1972), this Court emphasized that timely news reports beneficially enable the public to scrutinize the administration of justice, particularly with respect to the "commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . ."

The First Amendment interests at stake in the report of petitioner's arrest are of the highest significance. The article:

> involved a matter of paramount public import: the commission and investigation of a violent crime which had been reported to authorities.

Florida Star v. BJF, 491 U.S. 524, 536-37 (1989). Timely reports of arrests serve important sociological purposes. A neighborhood in which a brutal crime has been committed will be comforted to learn, through news reports, that the police have acted on the community's behalf:

> When a shocking crime occurs, a community reaction of outrage and public protest often follows. . . . Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers. . . . The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner."

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980).

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964), this Court held in a public official libel case that independent appellate review is required to ensure that no "forbidden intrusion on the field of free expression" occurs. In *Bose Corp. v. Consumers Union of the United States, supra,* 466 U.S. at 511, the Court reiterated that independent review of actual malice in public figure libel cases is necessary to determine whether the evidence in the record is sufficient to "strip the utterance of First Amendment protection . . ." Independent appellate review "reflects a deeply held conviction that judges . . . must exercise such review in order to preserve the pre-

cious liberties established and ordained by the Constitution." *Id.* at 510-11.

So, too, is independent appellate review of falsity in private figure libel cases required by the First Amendment. The Michigan Supreme Court recognized that in *Hepps* this Court held that proof of falsity in private figure libel cases is a "constitutional fact." (Pet. App. 14-15). Final determination of that constitutional fact may not be left to a jury alone, lest crucially important news articles, such as that at issue in this case, be unjustifiably "stripped" of First Amendment protection.

Indeed, independent appellate review of falsity is particularly important in private figure cases where, as in Michigan, a publisher is otherwise protected only by a negligence fault standard. Under the negligence standard, a libel plaintiff who proves falsity will typically recover a judgment. As a practical matter at trial, falsity is the principal, if not the exclusive, liability element in a private figure negligence case. Falsity effectively subsumes the issue of fault, because any creative libel plaintiff can, with 20/20 hindsight, easily lay out a "roadmap" to show the jury that the newspaper could "reasonably" have avoided publishing the falsehood. The negligence "fault" concept is ephemeral protection indeed for a newspaper publisher.

Thus an appellate court must have the constitutional duty and authority to set aside a jury verdict which is based, such as that at bar, on a literal but insubstantial inaccuracy in a news report: "any standard which would require strict accuracy in reporting legal events factually or in commenting upon them in the press would be an impossible one." *Pennekamp v. Florida*, 328 U.S. 331, 371-72 (1946) (Rutledge, J. concurring). Independent

appellate review of falsity in private figure libel actions is necessary "to ensure that protected expression will not be inhibited." *Bose Corp. v. Consumers Union of the United States, supra*, 466 U.S. at 505.

CONCLUSION

For the aforementioned reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 28, 1992

APPENDIX A

EXCERPT (PAGE 6) FROM PETITIONER'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR JNOV AND NEW TRIAL (4/15/88)

* * *

In conclusion then it appears that a private person plaintiff in Michigan in a libel case previously enjoyed a presumption of malice in cases of libel per se which entitled plaintiff to recover except in cases where the defense of truth was raised and proved. *However today's standard is that the private person plaintiff in a libel case which involves matters of public concern no longer enjoys the presumption of malice but must prove falsity of the article as opposed to the Defendant having to prove the truth and in addition to the foregoing as well as other elements of libel, must now prove that the publication was the result of Defendant's negligence as opposed to the actual malice burden of public figures ennunciated in New York Times, supra.*

As a preliminary matter it is Plaintiff's opinion that one other major issue should be addressed.

Plaintiff concedes that the article in question and its reference to the Plaintiff being arrested and being charged CSC and thereafter released on bond were true. However, as to the article's reference to facts referred to of details surrounding the alleged incident, a major disagreement of the parties exist.

Plaintiff claims that the reference to specifics of alleged facts surrounding the incident falsely suggests that the Plaintiff in fact committed the crime in question – after all he was identified, according to the article, by his own children.* * *

* * *

EXCEPRT (PAGE 10) FROM PETITIONER'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR JNOV AND NEW TRIAL (4/15/88)

* * *

Plaintiff concedes as previously stated that he was arrested, charged with Criminal Sexaul (sic) Conduct and released on a bond as stated in the article published by the Defendant. However, when dealing with facts in support of probable cause, the article is blantly (sic) and totally false. A review of the article itself supports Plaintiff's analysis.

The article itself is composed of the following ten sentences:

1. A 43-year-old man has been arrested and charged with the sexual assault of a 17-year-old woman who was baby-sitting with his children at his ex-wife's house on North Finlay Avenue in Bedford Township.

2. The suspect has been identified by Bedford Township police as David J. Rouch of 631 Golden Avenue.

3. He is free on a $10,000.00 personal recognizance interim bond pending his arraignment in District 10 Court next week.

4. Rouch is charged with first-degree criminal sexual conduct.

5. Police said Rouch allegedly entered the house about 4 a.m. Friday and attacked the young woman.

6. He is said to have used a knife to cut the victim's clothes off, police said.

7. The victim later called a relative, who took her to Community Hospital and then called police.

8. The suspect was identified by his children, according to police.

9. Rouch was arrested at his home by Emmett Township police who were informed where he lived by Bedford Township investigators.

10. The charge against Rouch was authorized Friday by the Calhoun County Prosecutor's Office.

APPENDIX B

EXCERPTS FROM TRIAL TRANSCRIPT SUMMATION BY RESPONDENT'S ATTORNEY

[1033] The first two questions that you are going to have to answer, ladies and gentlemen, is whether the Plaintiff has proven materially false statements were in the article, and that those materially false statements made the article libelous. What does the Plaintiff claim to be materially false statements? What does the evidence show? First, the main argument was – I'm not sure that it still is – was certainly that the Plaintiff was not arrested. Now, you don't have to figure out whether there was arrest under the criminal procedure code of the State of Michigan. You are not to consider technical or legal definitions. You should use common, ordinary language. It is well within your ability to determine from the evidence whether the Plaintiff was arrested. And I submit that the statement that the Plaintiff was arrested – statements – is true. He was rousted from bed in the middle of the night, he was handcuffed, he was thrown in the back of a police car, dragged down to a police station, fingerprinted, photographed and thrown into a jail cell. Ladies and gentlemen, that is an arrest. The Plaintiff testified that he was arrested. Minier testified that he was [1034] arrested. And Chief Bell testified that he was arrested. The evidence is uncontradicted that he was arrested.

The second claim of material falsity is that the Plaintiff was not charged. Again, what is the evidence on that? In common, ordinary language, the Plaintiff says under oath that he was charged. Minier said under oath that he was charged with criminal sexual conduct in the first degree and felonious assault. Questions from the

Plaintiffs lawyer during the trial indicated that the Plaintiff was charged. And right on the front page of Defendant's Exhibit A, the police report, on the left-hand side, the word charge appears and the word charge appears. Ladies and gentlemen, the evidence shows clearly that the Plaintiff was charged and that is true.

Another claim that has been made to you is that the Prosecutor never authorized the charge as is indicated in the last paragraph of the newspaper article. Again, that is the claim. What is the evidence? Defendant's Exhibit A says, disposition: "Prosecutor Pattison was briefed on the complaint and circumstances surrounding the arrest of suspect. He advised to lodge the suspect on CSC first." He authorized that charge over the telephone.

[1035] What does Mr. Bell say about that question?

Question: "Prosecutor Pattision was advised as to what the officers had found and heard from the witnesses, isn't that correct?"

"Yes."

"And what office did Pattison work for?

"The Calhoun County Prosecutor."

"And Prosecutor Pattison authorized Mr. Rouch arrested on the charge of criminal sexual conduct, first, isn't that correct?"

Answer: "Yes, uh-huh."

"Now, on December 21, did you approve the arrest of David Rouch?"

Answer: "No, the Prosecutor did it."

Question: "So you deferred to the Prosecutor's office for that?"

Answer: "Yes, uh-huh."

That's another example of the claim of material falsity that has simply not been proven.

You will have an opportunity, when you get into the jury room, to compare the police reports containing the

information to which this article relates, and you will find that this article is accurate. That they're even down to the dates of birth of the Defendant – criminal defendant – and the 17-year-old victim. And I [1036] invite you to make that comparison because it will – you will learn unequivocally that the article is accurate and it was received undoubtedly from the police.

There is, Mr. Sullivan agreed in his opening statement, one inaccuracy in this article. It's an inaccuracy that undoubtedly was transmitted by the police to Stan Kaufman. The inaccuracy is in the context of the article as a whole which is how you must evaluate it, not material. It does not make this article libelous. The falsity must be material, you will hear – it must be a major error. The only inaccuracy is that there are two references to children as opposed to stepchildren. But I suggest to you, ladies and gentlemen, that in the context of this article, reporting upon the arrest of the Plaintiff, it is not material – it is not a major factor to report that the suspect was identified by his children as opposed to reporting more precisely that the suspect was identified by his stepchildren and by the babysitter victim, which is what the truth was. The precise and literal truth.

* * *

APPENDIX C

EXCERPTS FROM PETITIONER'S BRIEF IN MICHIGAN SUPREME COURT

* * *

2. Standard of Review.

In reviewing the findings of falsity and negligence necessary to overcome the First Amendment protection accorded reports of matters of public interest, this Court has recently held that appellate courts must conduct an independent review of the evidence related to issues of "constitutional fact" to ensure [25] that the plaintiff has met his constitutionally mandated burden of proof. Locricchio v. Evening News Association, ___ Mich ___ , slip op at 28-30 (No. 86351 Aug. 26, 1991). The purpose of this independent review is to ensure that no jury verdict "against the great weight of the evidence" is allowed to "comprise a forbidden intrusion on protected speech." Id. at 29.

Independent review of the evidence does not include review of credibility issues. Id. at 27, n17. With respect to credibility of witnesses, the reviewing court therefore must assume that testimony favorable to the plaintiff is credible and exclude all directly conflisting testimony from its evaluation. The purpose of independent review is not to usurp the proper function of the jury but to ensure that the plaintiff has presented evidence sufficient to meet his constitutionally mandated burden of proof.

* * *

After a brief excursion into an irrelevant attack on the [37] constitutional analysis of the Court of Appeals[5], (Appellant's Brief at 37-38), Defendant argues that its failure to determine whether there was information suggesting that Mr. Rouch was innocent of the crime cannot be considered negligence supporting liability because any such information would not have affected its use of the word "charged" in the article (Appellant's Brief at 39). It erroneously assumes that such information would have to be obtained from Mr. Rouch himself. On the contrary, the evidence at trial showed that, had Mr. Kaufman talked to the investigating officers themselves, and had he bothered to ask them what Mr. Rouch had to say about the accusation, he would have learned not only that Mr. Rouch denied involvement in the crime and asserted he had an alibi but also that there were factors known to the investigating officers which cast considerable doubt on the accuracy of the eye-witness identifications. By his own admission, Mr. Kaufman made no attempt to determine whether the investigation had produced any exculpatory evidence or whether Mr. Rouch had made any statement denying involvement in the crime (Kaufman 606, 607, 609, 610, 612). Certainly, under these circumstances, a jury could legitimately conclude that Mr. Kaufman acted negligently in failing to make any attempt whatsoever to ensure that his [38] information was complete and could further conclude that Mr. Kaufman's lack of complete information was a major factor contributing to the false impression conveyed by the article as a whole.

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[5] Defendant's analysis of the Court of Appeals decision concerning negligence is essentially irrelevant here, as this Court will rule on the *judgment* of that Court rather than its reasoning and must do so after its own independent review of the evidence presented at trial.

* * *

APPENDIX D

EXCERPTS FROM PETITIONER'S BRIEF IN SUPPORT OF REHEARING FILED IN MICHIGAN SUPREME COURT

* * *

Indeed, there is considerable question as to whether the Supreme Court has instructed courts to independently review the factual record to determine whether defamation exists or, more specifically, whether a statement is materially false. Although the majority made favorable reference to Monaghan, *Constitutional Fact Review,* 85 Colum L Rev 229 (1985), it ignored the following language of that article:

> Even with respect to defamation actions, *Bose* needs further elaboration. For example, the Court makes no mention of its decision in Time, Inc. v. Firestone, 424 U.S. 448 (1976), in which it applied a clearly erroneous standard in reviewing a state court jury determination that a publication was not "factually correct." Id. at 457-59. . . . *Moreover, doubt exists whether the independent judgment requirement extends to the question whether the statements are in fact defamatory.*

Id. at 244 n.83 (emphasis added). The question of material falsity is, of course, a prerequisite to a prima facie showing of defamation. See *Locrhcchio, supra,* 438 Mich 84, 116; 476 NW2d 112, 133. It thus appears that the independent review standard may not even apply to the issue of material falsity.

Although the Plaintiff does not allege that it was erroneous for this Court to independently review the record in the present case, the proper scope of such independent review is clearly uncertain. Because of this

uncertainty, and because of the above cited case law, upon reconsideration of this matter, the Court should review the record to determine whether there was sufficient evidence for *the jury* to find material falsity.

* * *